

**Staff
Summary
Report**



To: Mayor and City Council

Agenda Item Number 20
Meeting Date: 08/08/02

**SUBJECT: NEWBERRY / TERRACE REDEVELOPMENT SITE –
DEVELOPMENT AND DISPOSITION AGREEMENT**

PREPARED BY: Neil Calfee, Principal Planner (480-350-2912)

REVIEWED BY: Steve Nielsen, Community Design and Development Director (480-350-8028)

BRIEF: Request approval of Development and Disposition Agreement between the City of Tempe and Barton Homes / Benton Robb Development Associates for the development of for-sale housing within the Apache Boulevard Redevelopment Area.

COMMENTS: **APACHE BOULEVARD (0403-06)** Approval is requested of a Development and Disposition Agreement between the City of Tempe and Barton Homes / Benton Robb Development Associates for the development of for-sale housing on a six-acre site located on Newberry Lane and Terrace Road, south of Spence Ave. within the Apache Boulevard Redevelopment Area.

Document Name: 20020808devsrh05 **Supporting Documents:** Yes

SUMMARY: Barton Homes / Benton Robb Development Associates (the “Developer”) responded to the City’s March 15, 2000 RFP, which called for the development of for-sale housing on an approximate 6 acre site located a six-acre site located on Newberry Lane and Terrace Road, south of Spence Ave. within the Apache Boulevard Redevelopment Area. Barton Homes / Benton Robb Development Associates was selected as prime developer for the site with exclusive rights to negotiate a Development and Disposition Agreement with the City for the development of the site.

HISTORY AND FACTS:

On March 15, 2000 the City issued an RFP for the development of for-sale housing, on a six-acre site on Newberry Lane and Terrace Road, south of Spence Ave. Barton Homes / Benton Robb Development Associates was selected as the developer and is proposing a 72-units of for sale housing comprised of traditional single family homes, cluster townhomes, and loft units. The original project concept plan was subsequently reduced by four units in response to neighborhood input. This project meets the goals of the Apache Boulevard Redevelopment Plan that calls for the revitalization of neighborhoods and the development of for-sale housing opportunities. The property is currently zoned R-4 which allows for up to 24 units per acre, under current market conditions this property would be developed into 120 apartments. By contrast, this proposal is 11 units to the acre and provides homeownership opportunities that are relatively affordable for new construction in Tempe.

This agreement provides for the sale of the six-acre site to the developer for \$2.26 per square foot, which is below the current market rate for the property. The land write-down is needed to make the lower density, for-sale project economically feasible. Other incentives include the City conducting a soil report and an engineering boundary survey on the property, additionally, sewer and water development fees would be paid from redevelopment funds. Also, pursuant to adopted council policy, development fees will be reduced by 50%.

FISCAL NOTE:

As proposed, the City would provide a land write-down and other incentives to make this project economically feasible. All funding would come from the currently allocated Apache Boulevard Redevelopment CIP funding.

RECOMMENDATION:

Approval of the attached DDA substantially as presented

When recorded, return to:
City of Tempe Basket

DEVELOPMENT AND DISPOSITION AGREEMENT

THIS DEVELOPMENT AND DISPOSITION AGREEMENT ("Agreement") is made as of the ____ day of _____, 2002, by and between THE CITY OF TEMPE, an Arizona municipal corporation (hereinafter called the "City"), and ARTISAN PARK LLC, an Arizona limited liability company (hereinafter called the "Developer").

RECITALS

A. The City is authorized to enter into development agreements pursuant to A.R.S. Section 9-500.05.

B. The City and Developer intend that this Agreement apply to and affect only the real property legally described in *Exhibit "A"* attached hereto and made a part hereof, and defined in this Agreement as the "Property."

C. The City promulgated a Request for Proposals (RFP), dated March 15, 2000, for the redevelopment of the Property which is located within the Apache Boulevard Redevelopment Area for development of "for-sale" housing (the "Project"). The Developer responded to the RFP and the City selected the Developer to develop the Property.

D. The City hereby intends to and does grant Developer exclusive development rights within the Property upon the terms and conditions set forth in the Agreement.

E. This Agreement is a development agreement within the meaning of A.R.S. Section 9-500.05 and shall be construed as such.

NOW, THEREFORE, in consideration of the premises, the promises contained in this Agreement and for good and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

ARTICLE I DEFINITIONS

The following terms shall have the meanings set forth below whenever used in this Agreement, except where the context clearly indicates otherwise:

1.1 **"Acquired by the City."** The term "Acquired by the City" shall mean immediate possession, purchase or other control of the Property, such that fee simple and insurable title can be conveyed to Developer.

1.2 **"Block."** The term "Block" shall mean and refer to a specifically designated portion of the Property, which may include one (1) Lot or more than one (1) Lot but less than all of the Lots to be developed within the Property.

1.3 **"City."** The term "City" shall mean and refer to the City of Tempe, an Arizona municipal corporation, and any successor public body or entity.

1.4 **"Conceptual Development Plan."** The term "Conceptual Development Plan" shall mean and refer to the development plan submitted by the Developer to the City in response to the RFP for redevelopment of the Property. A reduced copy of the Conceptual Development Plan for the Property is attached hereto as *Exhibit "B"*.

1.5 **"Developer."** The term "Developer" shall mean and refer to Artisan Park, LLC, an Arizona limited liability company, and its successors and assigns.

1.6 **"Final PAD."** The term "Final PAD" shall mean and refer to a Final PAD which is approved by the City with respect to the development of the Property or a particular phase therein, and which sets forth the specific uses, densities, features and other development matters with respect to the Property or a particular phase therein.

1.7 **"Improvements."** The term "Improvements" shall mean and refer to all public and private improvements which may be constructed from time to time on the Property, including, without limitation, all structures, buildings, roads, driveways, parking areas, walls, landscaping and other improvements of any type or kind, or any other alteration of the natural terrain to be built by the Developer or the City, as the case may be, pursuant to the terms of this Agreement.

1.8 **"Lot."** The term "Lot" shall mean and refer to each portion of the Property, which has been created as a residential lot pursuant to the Final PAD.

1.9 **"Preliminary PAD."** The term "Preliminary PAD" shall mean and refer to that Preliminary PAD which sets forth specific uses, densities, features and other development matters with respect to the Property.

1.10 **"Project."** The term "Project" as used in this Agreement shall mean and refer to the development of the Property for the purposes and uses described in the Conceptual Development Plan.

1.11 "Schedule of Performance." The term "Schedule of Performance" shall mean and refer to that schedule of performance agreed to by the City and the Developer as set forth in *Exhibit "C"* attached hereto and incorporated herein by this reference, which supercedes all previous schedules of performance applicable to the Property.

ARTICLE II DEVELOPMENT PLAN

2.2 Term. This Agreement shall be effective from the date executed until all provisions contained in the Schedule of Performance have been completed unless sooner terminated in accordance with the terms hereof.

2.2 Schedule of Performance. The City and the Developer intend that the planning and development of the Property shall be achieved pursuant to the Schedule of Performance attached hereto as *Exhibit "C"*. The Developer and the City shall each use their best efforts to ensure that development of the Property occurs in accordance with the Schedule of Performance.

2.3 Failure of Timely Performance. In the event that either party hereto fails to perform any of its obligations which are set forth in or contemplated by this Agreement or in the Schedule of Performance in a timely manner, and should such failure not otherwise be excused by further mutual agreement of the parties or by the express terms of this Agreement, such failure shall be considered to be a breach of this Agreement and the nonbreaching party shall have their respective remedies set forth in this Agreement.

2.4 Excused Delay in Performance. In addition to the specific provisions of this Agreement, any prevention, delay or stoppage due to strikes, lockouts, labor disputes, acts of God or inability to obtain labor and materials or reasonable substitutes therefor at a commercially-reasonable cost, governmental restrictions, regulations or controls, judicial orders, hostile governmental actions, civil commotion, acts of terrorism, fire or other casualty and other causes beyond the reasonable control of the City or the Developer (other than the financial condition of the City or the Developer) (an "Unavoidable Delay") will excuse the City or the Developer's performance hereunder for the period of the Unavoidable Delay, together with a reasonable start-up period if construction of any Improvements was suspended as a result of such Unavoidable Delay, provided that the following procedure is implemented by the party claiming delay. No later than 30 days from the date that the party claiming delay becomes aware of the event claimed to cause an Unavoidable Delay, the party claiming delay shall give written notice to the other and within 10 days of such written notice, both parties shall meet to reach agreement as to the effect of the Unavoidable Delay. In the event that the parties cannot agree upon the effect of the Unavoidable Delay, the provisions of *Section 11.1, Dispute Resolution*, shall apply.

2.5 Preliminary PAD and Final PAD. The Project shall be developed in general conformance with the Conceptual Development Plan. In connection therewith, the Developer shall provide to the City a draft Preliminary PAD for the Project, which is based upon the Conceptual Development Plan.

2.6 Rezoning. Concurrently with the City's initiation of the process for approval of the Preliminary PAD for the Project as contemplated in **Section 2.5** above, the City shall initiate and process, without fees to the Developer, a rezoning of the Property to a zoning classification which allows the uses and intensities of land use set forth in the Preliminary PAD and Final PAD.

2.7 Approvals. The City hereby agrees that, in connection with all such approval requests relating to the development of the Project and the construction of any Improvements, no new, unusual or extraordinary plan or review requirements, conditions or stipulations will be imposed on Developer.

2.8 Integration. By reference herein, the parties integrate and incorporate into this Agreement the RFP dated March 15, 2000 and Developer's response dated September 12, 2000 as modified and amended by this Agreement. In the event of any conflict between this Agreement and the RFP dated March 15, 2000 and/or the Developer's response dated September 12, 2000, the terms and provisions of this Agreement shall govern and control.

ARTICLE III ACQUISITION AND CONVEYANCE OF PROPERTY

3.1 Acquisition of Non-City-Owned Parcels. As of the date of this Agreement, the City owns some but not all of the parcels within the Property. The City shall retain fee title to all parcels currently owned by the City until they are conveyed to the Developer for purposes of the development thereof in accordance with the terms of this Agreement. From and after the date of this Agreement and, simultaneously with the processing of the Preliminary PAD as described in **Section 2.5** above, the City shall use its reasonable and diligent efforts to acquire all parcels which are not currently owned by the City through direct purchase, through its powers of eminent domain or through any other legal means available to the City. If eminent domain proceedings are required, the City shall diligently and continuously prosecute any such proceedings, including any necessary appeals, and shall seek immediate possession of all or any portion of the parcels with respect to which eminent domain proceedings are required. All costs and expenses incurred in connection with the acquisition of the parcels within the Property which are not currently owned by the City as well as any necessary relocation costs of the occupants thereof shall be the City's sole responsibility. After acquisition, the City shall retain title to all such parcels until such time as they are conveyed to the Developer for the purposes of development in accordance with the terms hereof.

3.2 Periodic Notices of Acquisitions; Delay in Acquisition of Property.

The City shall provide periodic notices to the Developer identifying those non-City-owned parcels which have been Acquired by the City and those parcels which have yet to be acquired. If, for any reason, all of the parcels within the Property which are not currently owned by the City have not been Acquired by the City by that date that is eighteen (18) months after the date of this Agreement (the "Outside Acquisition Date"), then, in that event, the City shall provide written notice to Developer, and Developer shall have the right to elect to either (a) terminate this Agreement by providing 90 days prior written notice to the City of such termination, or (b) meet with the City, whereupon the City and the Developer shall work together in good faith to adjust the boundaries of the Property subject to this Agreement and modify the Preliminary PAD to the extent feasible, to include only those parcels within the Property which are owned by the City as of the Outside Acquisition Date, whereupon all references to the Project shall be deemed to mean the Project as modified pursuant to such further agreement of the City and Developer.

3.3 Conveyance of Property to Developer. The City shall continue to hold fee title to the Property until such time as Developer requests the conveyance of any Lots therein. At such time as the Developer desires to acquire any Lots within the Property, and so long as Developer is not then in Default under this Agreement as defined in ***Section 6.1*** below, Developer shall deliver a written notice to the City, which notice shall indicate (a) the description of the Lots to be conveyed to Developer, (b) the total Base Purchase Price to be paid by the Developer with respect thereto as determined in accordance with ***Section 3.8.(a)*** below, and (c) the date by which the closing of the conveyance of such Lots is desired by Developer. In no event shall the close of Escrow occur, and transfer of title take place sooner than the first business day following thirty (30) days after the Tempe City Council has approved by ordinance the sale of the Property. The City and the Developer shall thereupon enter into an escrow with a third party escrow agent mutually acceptable to the City and Developer ("Escrow Agent"), who shall hold all documents, receive all monies and perform such other acts as are normal and customary for a commercial escrow agent in similar transactions. Notwithstanding anything contained herein to the contrary, unless otherwise agreed in writing, the Developer shall only have the right to request the conveyance of Lots in Blocks in accordance with the Block Exhibit attached hereto as ***Exhibit "D"*** (the "Block Exhibit"). In addition, the parties hereby acknowledge and agree that the first Block of Lots to be acquired by the Developer shall include at least fourteen (14) Lots within the Property as now constituted, the identity of which shall be subject to the reasonable approval of the City. Thereafter, Blocks may be acquired by Developer in any order desired by Developer. Concurrently with the conveyance of the Initial Block to Developer, the City shall also convey to the Developer the "Park Tracts" as described and depicted in the Conceptual Development Plan.

3.4 Due Diligence Information. Within the respective timeframe(s) set forth in the Schedule of Performance attached hereto as ***Exhibit "C"***, the City shall deliver to the Developer all reports, studies, investigations, materials, analyses, tests and evaluations which the City may have in its possession or its control related to the Property. In addition thereto, the City shall specifically obtain and provide to the Developer, at the City's sole cost

and expense, the specific property information and materials relating to the Property which are described in ***Exhibit "C"*** as and when required thereby. In addition to the materials provided by the City, the Developer shall have the right from time to time to enter upon any portion of the Property which is then owned by the City for the purpose of conducting any separate investigation, test, survey, analysis or evaluation with respect to the condition of the Property or any portion thereof. All such additional costs and expenses of any such tests, studies, surveys or analyses shall be paid for by the Developer. In the event any such analyses, tests, studies or evaluations discloses any condition which requires remediation or otherwise materially and adversely affects the developability of such portion of the Property, then, in that event, the Developer and the City shall work together in good faith to resolve or otherwise cure such matter as may be mutually agreed to by the parties.

3.5 Condition of Title; Title Insurance. All Lots within the Property which are conveyed by the City to the Developer shall be insured by an ALTA extended owner's policy of title insurance issued by the Title Company in an amount of coverage reasonably acceptable to Developer and insuring the Developer's fee title in and to the Lots which are the subject thereof, together with any additional endorsements desired by Developer, and subject only to those title exceptions which are set forth in a list of approved title exceptions executed by Developer and the City essentially simultaneously herewith (the "Permitted Title Exceptions"). In the event that, after the date of this Agreement and prior to the date of the conveyance of any Lot by the City to Developer, any additional title matters arise which are not contemplated by the Conceptual Development Plan or caused or created by the Developer, the City and the Developer shall work together in good faith to resolve such additional title matters. Moreover, the City shall not place any liens, easements or other encumbrances on the Property without the written consent of the Developer, in the Developer's sole discretion. The City shall pay that portion of the title insurance premium equal to a standard coverage title insurance policy and the Developer shall pay the incremental additional cost of the extended coverage insurance and any additional endorsements requested by Developer.

3.6 Preparation of Property for Development. The parties hereby acknowledge and agree that the Property shall be prepared for redevelopment by the parties as follows:

(a) The City shall, at its sole cost and expense, (i) prior to the closing of the Developer's acquisition of the Initial Block, gut, demolish and remove all existing Improvements on the Property, including, without limitation, the demolition and removal of all structures, walls, fences, sidewalks and other aboveground Improvements which are not otherwise intended to be incorporated into the Project pursuant to the Preliminary PAD and Final PAD, and (ii) upon payment by Developer of the normal, scheduled tap fees imposed by the City, the City will install sewer and water taps into existing sewer and water trunk lines within the public streets necessary in accordance with the Final PAD.

(b) The Developer shall remove or relocate, or caused to be removed and/or relocated, or otherwise abandoned, all private utility lines and conduits serving the Property. In connection therewith, the Developer shall have the right to, and the City hereby grants to Developer, an easement for the purpose of facilitating the same, pursuant to which, prior to the close of escrow of any Lot, the Developer shall have the right to enter upon all portions of the Property then owned by the City for the purpose of the relocation and installation of utility lines and conduits and other appurtenances and Improvements necessary or desirable in connection with the development of the Project.

(c) City shall construct, to its standards, and in conjunction with the Developer's schedule for construction of site improvements to the Property, Newberry Lane within the Property, and Developer will construct all other private streets within the Property in accordance with the approved Final PAD; provided, however, that after the installation of the sewer and water taps to the Lots bordering Terrace Road, the City shall resurface Terrace Road.

(d) The Developer shall prepare a geotechnical soils report for the Property, the cost of which will be credited toward the purchase price of the Initial Block of Lots.

3.7 Form of Deed. Fee simple title to each Lot conveyed by the City to the Developer shall be conveyed pursuant to a special warranty deed executed by the City, subject only to the Permitted Title Exceptions and any additional title matters approved by the Developer pursuant to *Section 3.5* above.

3.8 Purchase Price.

(a) **Base Purchase Price.** The base purchase price ("Base Purchase Price") to be paid by the Developer for each Lot within the Property shall be an amount equal to (i) the total square feet of land area included within such Lot multiplied by (ii) an amount determined by dividing the sum of Five Hundred Thousand Dollars (\$500,000.00) by the total Gross Square Footage (i.e., all square footage within the Property excluding public streets). The Base Purchase Price shall be paid in cash or other immediately available funds at each close of escrow with respect to the Lot(s) then being acquired by the Developer. The Developer shall receive a credit against the Base Purchase Price to be paid by the Developer for the initial Block of Lots in an amount equal to the costs incurred by the Developer in obtaining the geotechnical soils report for the Property described in *Section 3.6(d)* above.

(b) **Deferred Contingent Acquisition Fee.** In addition to the payment of the Base Purchase Price set forth in *Section 3.8(a)*, the Developer shall, if applicable, pay to the City a deferred contingent acquisition fee as hereinafter set forth (the "Deferred Contingent Acquisition Fee"). The Deferred Contingent

Acquisition Fee shall be calculated by aggregating the amount of all sales proceeds received by Developer in connection with the sale of all Lots within the Project to third-party purchasers, less the total Development Costs of the Project (acquisition costs not to exceed those costs paid by Developer to the City pursuant to **Section 3.3**, plus the incremental additional costs of extended coverage title insurance and escrow charges) incurred by the Developer in connection with the planning, developing, financing, administration and overhead, marketing and sale of the Project and all Improvements constructed by Developer thereon (collectively, the "Development Costs"). In the event the pre-tax gross margin on the Project realized by the Developer exceeds fifteen percent (15%), the Deferred Contingent Acquisition Fee shall be equal to the amount of the pre-tax gross margin in excess of fifteen percent (15%), but in any event not to exceed sixty cents (.60¢) per gross square foot of land area (the "Fee Cap"). Any proceeds in excess of the Fee Cap shall be retained by the Developer. Within one hundred twenty (120) days after the Close of Escrow of the sale of the last Lot within the Project by the Developer to a third party, the Developer shall determine the Deferred Contingent Acquisition Fee, if any, derived from the Project and remit that amount to the City; provided, however, that in the event that the sale of the last Lot within the Property has not occurred by the date set forth therefor in the Schedule of Performance, then upon the date set forth in the Schedule of Performance for the sale of the last Lot within the Project the Developer shall determine the Deferred Contingent Acquisition Fee, if any, with respect to all previously sold Lots within the Project and remit that amount to the City. If the City does not thereafter elect to terminate this Agreement as a result of the failure of the Developer to acquire and sell all Lots within the Property by the last date required therefor in the Schedule of Performance, then, in that event, the Developer shall continue to calculate and pay to the City any additional Deferred Contingent Acquisition Fees on a quarterly basis until all Lots have been sold by Developer, or the City has elected to terminate this Agreement, whichever occurs first. Within forty-five (45) days after the remittance of any such Deferred Contingent Acquisition Fee, during normal business hours and upon at least five (5) days prior written notice to Developer, the City shall have the right to inspect and review the Developer's books and records with respect to the Development Costs and all net sales proceeds realized by the Developer in connection with the marketing and sale of Lots within the Project in order to verify the amount of the Deferred Contingent Acquisition Fee to be paid to the City. Any disputes related to this **Section 3.8(b)** shall be resolved by mediation pursuant to **Section 11.1** of this Agreement.

3.9 Prorations. All real property taxes and assessments shall be prorated between the City and Developer as of the date of closing of the conveyance of any Lot within the Property to Developer, based upon the latest available information. In addition, the City shall be responsible for paying all delinquent taxes, assessments or bonds which are a lien on any Lot prior to the conveyance to the Developer. Prior to or as soon as possible after the conveyance of any Lot within the Property to the Developer, the City and the Developer shall work together in good faith in order to cause all tax parcels within the Property to be reparcelized in order to conform to the Final PAD for the Project.

3.10 Escrow Fees. The City and Developer shall each bear their own costs, including attorney's fees, in connection with the negotiation, due diligence, investigation and conduct of the transaction. City shall pay all of Escrow Agent's customary escrow fees and recording fees.

ARTICLE IV DEVELOPMENT FEES

4.1 Development Fees. City shall reduce by fifty percent (50%) all planning and building plan check fees, excavating and grading fees, engineering fees, and building permit fees, including, without limitation, mechanical, electrical and plumbing permit fees, and shall abate all sewer and water development fees associated with the Project, excluding only normal and scheduled water meter and tap fees and sewer drilling and tap fees.

ARTICLE V INDEMNIFICATION

The Developer shall indemnify, defend and hold harmless the City, its Council members, officers, employees, and agents from any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, including, without limitation, reasonable attorney's fees and costs of defense arising out of the negligence or willful misconduct of the Developer in connection with the Developer's development of the project, except to the extent resulting from the negligence or willful misconduct of the City, its employees, agents or contractors.

ARTICLE VI DEFAULT; REMEDIES; TERMINATION

6.1 Events Constituting Default. A party hereunder shall be deemed to be in default under this Agreement (a "Default") if such party breaches any obligation required to be performed by the respective party hereunder within any time period required for such performance, including, without limitation, any failure to comply with the Schedule of Performance attached hereto as *Exhibit "C"*, and fails to cure such breach within ninety (90) days after receipt of written notice thereof from the nonbreaching party.

6.2 City's Default; Developer's Remedies. In the event that, subsequent to the Outside Acquisition Date, the City is in Default under this Agreement as defined in *Section 6.1* above, then, in that event, the Developer shall have the right to elect to either (a) seek specific performance of this Agreement, (b) terminate this Agreement upon written notice to the City, or (c) pursue any other remedy at law or equity.

6.3 Developer's Default; City's Remedies; Right to Repurchase. In the event that Developer is in Default under this Agreement by failing to develop the Property in accordance with the Schedule of Performance attached hereto as *Exhibit "C"*, then the City shall have the right to terminate this Agreement immediately upon written notice to Developer and, if it so elects, within one hundred eighty (180) days after notice of termination, to repurchase any Lot previously purchased by the Developer so long as the Developer has not yet obtained a financial loan secured by such Lot for the purpose of the construction of Improvements. If the City elects to repurchase any such Lot(s) as a result of a Default by Developer, the City shall repurchase such Lot(s) at the same price paid by the Developer to the City pursuant to *Section 3.8* above.

ARTICLE VII TERMINATION OF DEVELOPMENT/ACQUISITION RIGHTS

Upon the termination of this Agreement as provided herein, the Developer shall have no further rights to acquire and develop any portion of the Property pursuant to this Agreement, except with respect to any Lot for which the Developer has already obtained financial commitments as described in *Section 6.3*, or with respect to which the City does not elect to repurchase pursuant to *Section 6.3*.

ARTICLE VIII ASSIGNMENT OF INTEREST

This Agreement may not be assigned by the Developer without the written consent of the City; provided, however, that the Developer shall have the right to assign its interest in this Agreement without the City's consent, so long as the assignee is (a) a parent, subsidiary, division or member of Developer, or (b) an entity in which Developer is a principal with a controlling interest. No transfer to such assignee shall be binding upon the City unless such assignee shall deliver to City a recordable instrument which contains a covenant of assumption by the assignee of the obligations of Developer under this Agreement, but the failure or refusal to deliver such instrument shall not release or discharge the assignee from its obligations hereunder. This provision shall not apply to and shall not limit the ability of Developer to enter into financing agreements with financial entities or institutions for the development of the Property, and the right of the Developer to assign, as collateral security for its performance under any such financing arrangements, the Developer's interest under this Agreement.

ARTICLE IX CONFLICT OF INTEREST; REPRESENTATIVES NOT INDIVIDUALLY LIABLE

9.1 Conflict of Interest. Pursuant to Arizona law, rules and regulations, no member, official or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his or her personal interest or the

interest of any corporation, partnership or association in which he or she is, directly or indirectly, interested. This Agreement is subject to the provisions of A.R.S. § 38-511.

9.2 No Personal Liability. No member, official or employee of the City shall be personally liable to Developer, or any successor or assignee, (a) in the event of any default or breach by the City, (b) for any amount which may become due to the Developer or its successor or assign, or (c) pursuant to any obligation of the City under the terms of this Agreement.

ARTICLE X NOTICES

All Notices which shall or may be given pursuant to this Agreement shall be in writing and transmitted by registered or certified mail, return receipt requested, addressed as follows:

To Developer: Benton-Robb Development Associates, LLP
180 South Ash Avenue
Tempe, Arizona 85281
Attn: Ross Robb

JP Development Holdings, LLC
15615 North 71st Street
Scottsdale, Arizona 85254
Attn: Patrick A. Barker

With a copy to: Jeffrey J. Miller, Esq.
Gammage & Burnham PLC
Two North Central Avenue
18th Floor
Phoenix, Arizona 85004

To the City: City Manager
City of Tempe
31 East Fifth Street
Tempe, Arizona 85281

With a copy to: City Attorney
City of Tempe
31 East Fifth Street
Tempe, Arizona 85281

Either party may designate any other address for this purpose by written notice to the other party in the manner described herein.

ARTICLE XI GENERAL PROVISIONS

11.1 Dispute Resolution. In the event that there is a dispute hereunder which the parties cannot resolve between themselves, the parties agree that there shall be a forty-five (45) day moratorium on litigation during which time the parties agree to attempt to settle the dispute by nonbinding mediation before commencement of litigation. The mediation shall be held under the commercial mediation rules of the American Arbitration Association. The matter in dispute shall be submitted to a mediator mutually selected by Developer and the City. In the event that the parties cannot agree upon the selection of a mediator within seven (7) days, then within three (3) days thereafter, the City and the Developer shall request the presiding judge of the Superior Court in and for the County of Maricopa, State of Arizona, to appoint an independent mediator. The mediator selected shall have at least five (5) years' experience in mediating or arbitrating disputes relating to residential property development. The cost of any such mediation shall be divided equally between the City and Developer. The results of the mediation shall be nonbinding on the parties, and any party shall be free to initiate litigation subsequent to the moratorium.

11.2 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona. This Agreement has been made and entered into in Maricopa County, Arizona.

11.3 Successors and Assigns. This Agreement shall run with the land and all of the covenants and conditions set forth herein shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

11.4 Waiver. No waiver by either party of any breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same for any other term, covenant or condition herein contained.

11.5 Attorneys' Fees. In the event of any actual litigation between the parties in connection with this Agreement, the party prevailing in such action shall be entitled to recover from the other party all of its costs and fees, including reasonable attorneys' fees, which shall be determined by the court and not by the jury.

11.6 Severability. In the event that any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law.

11.7 Schedules and Exhibits. All schedules and exhibits attached hereto are incorporated herein by this reference as though fully set forth herein.

11.8 Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, are hereby superseded and merged herein.

11.9 Recordation of Agreement. This Agreement shall be recorded in the Official Records of Maricopa County, Arizona, within ten (10) days after its approval and execution by the City.

11.10 Manager's Power to Consent. The City hereby acknowledges and agrees that any unnecessary delay hereunder would adversely affect the Developer and/or the development of the Property, and hereby authorizes and empowers the City Manager to consent to any and all requests of the Developer requiring the consent of the City hereunder without further action of the City Council, except for any actions requiring City Council approval as a matter of law, including, without limitation, any amendment or modification of this Agreement.

11.11 Estoppel Certificates. Within fifteen (15) days after receipt of written request therefor from the Developer, the City shall furnish to the Developer an estoppel certificate ("Estoppel Certificate") stating that the Developer has, to the date of the issuance of such Estoppel Certificate, satisfied Developer's contractual obligations with respect to the Project or which respect to the portion of the Project referred to in the Estoppel Certificate or, if the Developer has not satisfied its contractual obligations, stating those obligations which the Developer has not satisfied. Upon issuance of an Estoppel Certificate, the City shall be estopped to deny the truth of any statement made in such Estoppel Certificate. If the City fails to timely execute and deliver such Estoppel Certificate, the Developer and any third party may conclusively presume and rely upon the following facts:

- (a) That the terms and provisions of this Agreement have not been changed except as represented by the Developer;
- (b) That the Developer has obtained the approvals of the City as set forth in the Developer's statement; and
- (c) That the Developer is not in default under the terms and provisions of this Agreement.

[END OF TEXT]

IN WITNESS WHEREOF, the City has caused this Agreement to be duly executed in its name and behalf by its Mayor and its seal to be hereunto duly affixed and attested to by the City Clerk, and the Developer has executed and sealed the same on or as of the day and year first above written.

ATTEST:

"CITY"

THE CITY OF TEMPE, an Arizona
municipal corporation

City Clerk

APPROVED AS TO FORM:

By _____
Neil Giuliano, Mayor

City Attorney

STATE OF ARIZONA)
 : ss.
COUNTY OF MARICOPA)

On this _____ day of _____, 2002, before me, the undersigned officer, personally appeared Neil Giuliano, who acknowledged himself to be Mayor of THE CITY OF TEMPE, an Arizona municipal corporation:

_____ whom I know personally;
_____ whose identity was proven to me on the oath of
_____, a credible witness by me duly
sworn;
_____ whose identity I verified on the basis of his/her

and he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

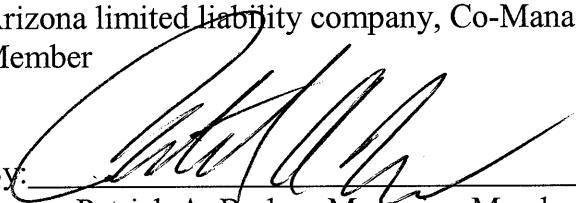
NOTARY SEAL:

Notary Public

"DEVELOPER"


ARTISAN PARK, LLC, an Arizona limited liability company

By: JP DEVELOPMENT HOLDINGS, LLC, an Arizona limited liability company, Co-Managing Member

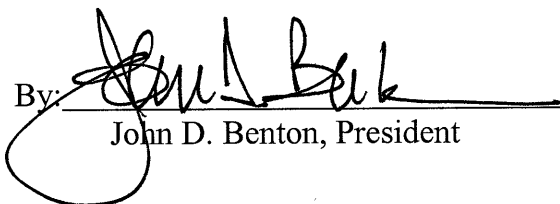
By: 
Patrick A. Barker, Managing Member

By: BENTON-ROBB DEVELOPMENT ASSOCIATES, LLP, an Arizona limited liability partnership, Co-Managing Member

By: ROBB MANAGEMENT SERVICES, INC., an Arizona corporation, its Co-Managing Partner

By: 
Ross L. Robb, President

By: BENTCO, INC., an Arizona corporation, its Co-Managing Partner

By: 
John D. Benton, President

STATE OF ARIZONA)
)
:SS.
COUNTY OF MARICOPA)

On this 1st day of August, 2002, before me, the undersigned officer, personally appeared Patrick A. Barker, the Managing Member of JP DEVELOPMENT HOLDINGS, LLC, an Arizona limited liability company, a Co-Managing Member of ARTISAN PARK, LLC, an Arizona limited liability company:

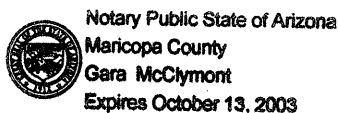
X whom I know personally;
_____ whose identity was proven to me on the oath of _____, a credible
witness by me duly sworn;
_____ whose identity I verified on the basis of his/her _____,

and he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

NOTARY SEAL:

Gara McClymont
Notary Public



STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this 30th day of July, 2002, before me, the undersigned officer, personally appeared Ross L. Robb, the President of ROBB MANAGEMENT SERVICES, INC., an Arizona corporation, a Co-Managing Partner of BENTON-ROBB DEVELOPMENT ASSOCIATES, LLP, an Arizona limited liability partnership, a Co-Managing Member of ARTISAN PARK, LLC, an Arizona limited liability company:

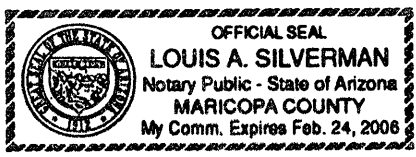
✓ whom I know personally;
_____ whose identity was proven to me on the oath of _____, a credible witness by me duly sworn;
_____ whose identity I verified on the basis of his/her _____,

and he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

NOTARY SEAL:

Louis A. Silverman
Notary Public



STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this 30th day of July, 2002, before me, the undersigned officer, personally appeared John D. Benton, the President of BENTCO, INC., an Arizona corporation, a Co-Managing Partner of BENTON-ROBB DEVELOPMENT ASSOCIATES, LLP, an Arizona limited liability partnership, a Co-Managing Member of ARTISAN PARK, LLC, an Arizona limited liability company:

✓ whom I know personally;
_____ whose identity was proven to me on the oath of _____, a credible witness by me duly sworn;
_____ whose identity I verified on the basis of his/her _____,

and he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

NOTARY SEAL:

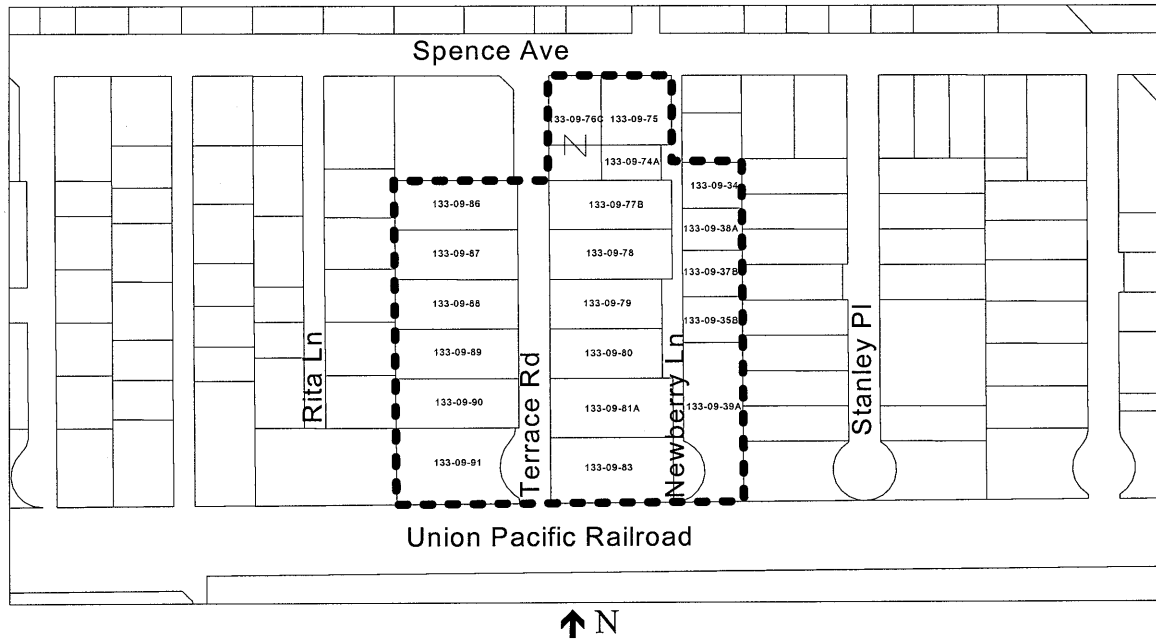
Louis A. Silverman
Notary Public



LIST OF EXHIBITS

- Exhibit "A"* - *Legal Description of Project Property*
- Exhibit "B"* - *Conceptual Development Plan*
- Exhibit "C"* - *Schedule of Performance*
- Exhibit "D"* - *Block Exhibit*

Exhibit "A" - Legal Description of Property



Assessor's Number 133 09 034

Parcel 1:

The South 65 feet of the North 190 feet of Lot 36, JEN TILLY TERRACE, a subdivision recorded in Book 28 of Maps, page 40, records of Maricopa County, Arizona; Except the West 15 feet.

Parcel 2:

A non-exclusive easement for ingress and egress over the West 12 feet of the North 125 feet of Lot 36, JEN TILLY TERRACE, a subdivision recorded in Book 28 of Maps, page 40, records of Maricopa County, Arizona

Assessor's Number 133 09 035B

The North 65 feet of the South 185 feet of Lot 36, JEN TILLY TERRACE, a subdivision recorded in Book 28 of Maps, page 40, records of Maricopa County, Arizona; Except the West 15 feet conveyed to the City of Tempe in Deed recorded in Docket 7536, page 274.

Assessor's Number 133 09 037B

The North 65 feet of the South 250 feet of Lot 36, JEN TILLY TERRACE, a subdivision recorded in Book 28 of Maps, page 40, records of Maricopa County, Arizona; Except the West 15 feet.

Assessor's Number 133 09 038A

Lot 36, JEN TILLY TERRACE, a subdivision recorded in Book 28 of Maps, page 40, records of Maricopa County, Arizona; Except the South 250 feet; and Except the North 190 feet; and Except the West 15 feet.

Assessor's Number 133 09 039A

The South 120 feet of Lot 36, JEN TILLY TERRACE, a subdivision recorded in Book 28 of Maps, page 40, records of Maricopa County, Arizona

Assessor's Number 133 09 074A

The South 50 Feet of Lot 1, Block 1, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona; Except the East 15 feet.

Assessor's Number 133 09 075

Lot 1, Block 1, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona; Except the South 50 feet.

Assessor's Number 133 09 076C

Parcel 1:

Lot 2, Block 1, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona

Parcel 2:

The South 50 feet of Lot 1, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona; Except the East 15 feet.

Assessor's Number 133 09 077B

Lot 3, Block 1, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona

Assessor's Number 133 09 078

Lot 4, Block 1, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona

Assessor's Number 133 09 079

Lot 5, Block 1, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona; Except the East 15 feet.

Assessor's Number 133 09 080

Lot 6, Block 1, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona; Except the East 15 feet.

Assessor's Number 133 09 081

Lot 7 and 8, Block 1, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona

Assessor's Number 133 09 083

The South 94 feet of Lot 8, Block 1, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona

Assessor's Number 133 09 086

Lot 3, Block 2, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona

Assessor's Number 133 09 087

Lot 4, Block 2, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona

Assessor's Number 133 09 088

Lot 5, Block 2, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona

Assessor's Number 133 09 089

Lot 6, Block 2, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona

Assessor's Number 133 09 090

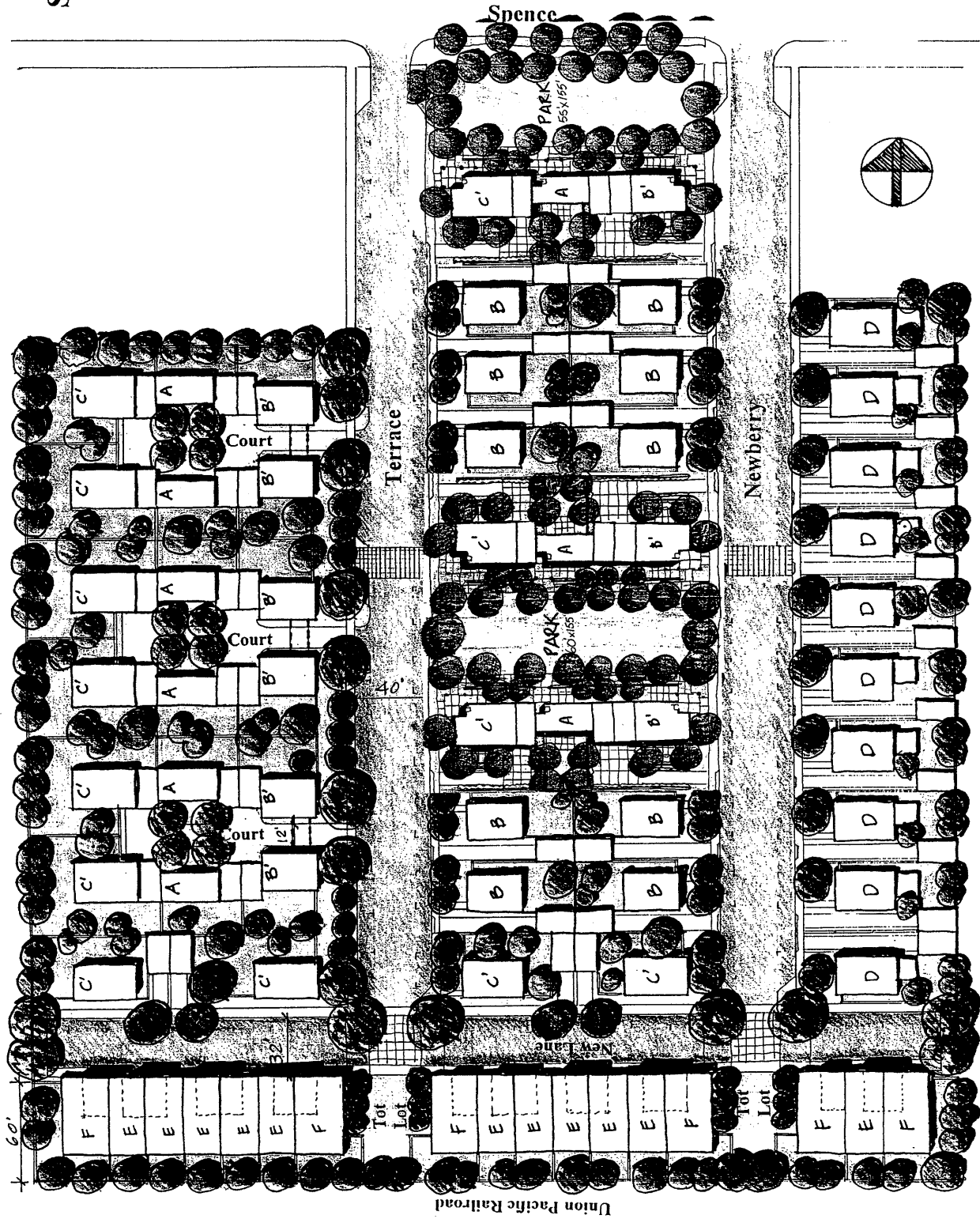
Lot 7, Block 2, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona

Assessor's Number 133 09 091

Lot 8, Block 2, Terrace Tract, a subdivision recorded in Book 37 of Maps, page 13, records of Maricopa County, Arizona; Except the part Deeded to the City of Tempe DKT 87-570792

Exhibit "B" - Conceptual Development Plan

Site Plan



BARTON HOMES

with

BENTON & ROBB
Development Associates

Artisan Park

Tempe, Arizona
August 29, 2000

PYATOK ASSOCIATES
Architects

Exhibit "C" - Schedule of Performance

Delivery of current update of existing Phase I Environmental Assessment prepared with respect to entirety of Property	On or before execution of Agreement
Delivery by City to Developer of boundary survey depicting the exterior boundary lines of all of the parcels within the Property and showing the location of any aboveground or underground SRP irrigation lines	On or before execution of Agreement
Delivery by City to Developer of "as-built" plans and specifications for all existing public utilities and private irrigation facilities serving the Property	On or before execution of Agreement
Delivery by City to Developer of ALTA survey of all parcels within the Property	On or before thirty (30) days after mutual execution of Agreement
Submittal of PAD and preliminary subdivision plat by Developer and initiation of rezoning by City	On or before four (4) months after completion of the acquisition of the non-City owned parcels
Engineering and Development Plans submitted by Developer	On or before two (2) months after PAD approval by the City
Begin construction of site improvements	On or before three (3) months after City's approval of engineering and development plans and recordation of the Plat
Begin sales	On or before three (3) months after commencement of construction of site improvements
Complete construction and sale of last Lot	On or before forty (40) months after approval of PAD and recordation of the Plat by the City

EXHIBIT D "Block Exhibit"

Union Pacific Railroad

